STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 2, 2013
v	No. 308945 Kent Circuit Court
GREGORY MICHAEL MANN, Defendant-Appellant.	LC No. 11-005642-FH

Before: FITZGERALD, P.J., and O'CONNELL and SHAPIRO, JJ.

SHAPIRO, J. (*concurring*).

I agree with the majority on all issues except its treatment of the prosecutor's failure to comply with the requirements of MCL 768.27a under which evidence of prior sexual acts with two other minors was admitted. That statute provides:

> If the prosecuting attorney intends to offer evidence under this section, the prosecuting attorney *shall disclose the evidence* to the defendant at least 15 days before the scheduled date of trial or at a later date as allowed by the court for good cause shown, *including the statements of witnesses or a summary of the substance of any testimony that is expected to be offered*. (emphasis added).

It is clear that the prosecutor failed to comply with this mandatory provision. The record does not contain any document giving notice of testimony to be given under MCL 768.27a. The names of the two witnesses are listed on the information, but it does not indicate that their testimony was being offered pursuant to that statute nor even that they would testify as to uncharged allegations of sexual abuse against other minors. Similarly, there is nothing in the record to suggest that the prosecutor provided defense counsel with "statements of the witnesses or a summary of the substance of any testimony that is expected to be offered" as the statute requires. The prosecution's brief on appeal tries to minimize its duty under the statute by suggesting that notice may be given in non-written form, a proposition which would render review completely impractical and require the trial court to take testimony and determine which attorney is telling the truth. Perhaps more to the point here, however, is the fact the prosecution brief makes this argument in only in a theoretical way, it never actually asserts that non-written notice was provided in this case.

The statute is clear. The prosecutor "shall" provide this information to the defense and there is no requirement that the defense make any request in order to trigger the prosecutor's duty. Had the defense objected on these grounds, the testimony of the two prior acts witnesses would have had to be excluded absent "good cause shown."

As already noted, however, the defense did not object, and as the trial court was not aware that there had been a failure of notice, the court committed no error, plain or otherwise. The remaining question raised by defendant is whether defense counsel's failure to object constituted ineffective assistance of counsel requiring reversal. Certainly the testimony of the two witnesses was a central part of the prosecution's case and the fact that they testified made conviction far more likely. However, that is not the end of the prejudice inquiry since defense counsel may have had full knowledge from other sources of the expected content of the witnesses' testimony and been fully prepared for it. As no claim has been made that defense counsel was actually unaware of the purpose and expected substance of that testimony, and there has been no request for an opportunity to establish that fact, I would not reverse on this basis.

Although reversal is not required in this case, prosecutors should observe the mandatory notice requirements of MCL 768.27a in order to avoid exclusion of evidence otherwise admissible under that statute.

/s/ Douglas B. Shapiro